Supreme Court, U.S.
FILED
04 392 SEP 16 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MARGARET PALCKO, PETITIONER

v.

AIRBORNE EXPRESS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. SPRAGUE, ESQUIRE
Counsel of Record
DAVID L. DACOSTA, ESQUIRE
JOSEPH J. MCALEE, ESQUIRE
TYLER E. WREN, ESQUIRE
SPRAGUE & SPRAGUE
The Wellington Building
135 So. 19th Street
Suite 400
Philadelphia, PA 19103
(215) 561-7681
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether the Court of Appeals had appellate jurisdiction pursuant to section 16 of the Federal Arbitration Act ("FAA") to review the District Court's otherwise unappealable interlocutory order denying the defendant's motion to compel arbitration of plaintiff's employment related claims, where the Court of Appeals concurred with the District Court's findings that plaintiff's employment contract providing for arbitration was exempt from FAA coverage under Section 1 of the Act?

2. Whether the Court of Appeals had pendent appellate jurisdiction to review under state law the District Court's interlocutory order denying defendant's motion to compel arbitration, where the Court of Appeals had no primary appellate jurisdiction under section 16 of the FAA?

3. Whether the Court of Appeals, having properly concluded that plaintiff was an exempt worker under the FAA, improperly reversed the District Court order on the basis of Washington state law where Congress, in exempting from FAA coverage transportation workers engaged in interstate commerce, clearly evidenced its intent to preempt state law enforcing arbitration agreements with respect to such workers?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 16

APPENDIX

CIRCUIT COURT ORDER (06/18/04) 1a

DISTRICT COURT ORDER (04/24/03) 22a

STATUTORY PROVISIONS INVOLVED 31a

TABLE OF AUTHORITIES

Page

CASES

ALLIED-BRUCE TERMINEX COMPANIES V. DOBSON, 513 U.S. 265 (1995) 12, 14

CARGILL FERROUS INTERNATIONAL V. SEA PHOENIX MV, 325 F.3D 695 (5TH CIR. 2003) 7

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND V. CENTRAL CARTAGE COMPANY, 84 F.3D 988 (7TH CIR. 1996) 7

CIRCUIT CITY V. ADAMS, 532 U.S. 105 (2001) 11

MASON DIXON LINES, INC. V. LOCAL UNION NO. 560, 443 F.2D 807 (3RD CIR. 1971) 10

MICROCHIP TECHNOLOGY INCORPORATED V. U.S. PHILLIPS CORP., 367 F.3D 1350 (FED. CIR. 2004) 8

MOSES H. CONE MEMORIAL HOSPITAL V. MERCURY CONSTR. CORP., 460 U.S. 1 (1983) 14

PRIMA PAINT CORP. V. FLOOD & CONKLIN MFG. CO., 388 U.S. 395 (1967) 14

RODRIGUEZ V. UNITED STATES, 480 U.S. 522 (1987) 11

RODRIGUEZ V. HANDY, 802 F.2D 817 (5TH CIR. 1986) 9

SOUTHLAND CORP. V. KEATING, 465 U.S. 1 (1984) 14

UNITED STATES V. UNITED MINE WORKERS OF AMERICA, 330 U.S. 258 (1947) 7

VOLT INFORMATION SCIENCES, INC. v. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, 489 U.S. 468 (1989) 10, 14

MISCELLANEOUS

9 U.S.C. §1 ..... *passim*

9 U.S.C. §2 ..... 12, 14

9 U.S.C. § 4 4

9 U.S.C. § 16(a) ..... *passim*

28 U.S.C. §1291 ..... 4, 6

OPINIONS BELOW

1. The April 23, 2003 Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania denying respondent's motion to compel arbitration is reported at 2003 WL 21077048 (E.D. Pa.) and reproduced at Appendix 22a.

2. The June 18, 2004 opinion of the Third Circuit Court of Appeals reversing the District Court is reported at 372 F.3d 588 (3rd Cir. 2004) and reproduced at Appendix 1a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the June 18, 2004 decision of the Third Circuit Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 9 U.S.C. §§ 1, 2, 4 and 16 and are reproduced at Appendix 31a.

STATEMENT OF THE CASE

On May 20, 2002, petitioner Margaret Palcko ("plaintiff") filed in the District Court a complaint against her former employer, respondent Airborne Express, Inc. ("defendant") alleging causes of action under Title VII of the Civil Rights Act of 1964 and the

Pennsylvania Human Relations Act for defendant's acts of sexual discrimination, creation of a hostile work environment and unlawful retaliation.

On November 1, 2002, defendant filed a motion to compel arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1- 16)(hereinafter "FAA") alleging that plaintiff was required to arbitrate her employment-related claims against defendant pursuant to a contractual arbitration agreement enforceable under the FAA and Washington state law.[1] Plaintiff opposed defendant's motion to compel arbitration and, on April 23, 2003, the Honorable Thomas N. O'Neill, Jr. issued an Order and Memorandum Opinion denying defendant's motion on the basis that the agreement was not enforceable under the FAA as plaintiff was an exempt employee under the Act, and was not unenforceable under Washington law as the FAA preempted state law. App. at 29a-30a.

Defendant appealed to the Third Circuit Court of Appeals from the District Court's interlocutory order denying arbitration, asserting §16(a) of the FAA as the sole basis for appellate jurisdiction. Plaintiff argued that because she was a transportation worker in interstate commerce exempt from the FAA under section 1 of the Act, section 16 of the Act, authorizing

---

[1]The relevant language in the arbitration agreement between the parties states: "Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply. App. at 3a.

appeals of otherwise unappealable interlocutory orders denying arbitration, did not apply and, therefore, the Court of Appeals had no jurisdiction to hear the appeal. Alternatively, plaintiff argued that the FAA preempted state law.

On June 18, 2004, the Court of Appeals issued an opinion holding that, while it agreed with the District Court that plaintiff was a transportation worker in interstate commerce exempt from coverage under the FAA by section 1 of the Act, it nevertheless did have jurisdiction under section 16(a) of the FAA to hear the interlocutory appeal. The Third Circuit then determined that, while section 16(a) of the Act did not authorize the court to review defendant's contention that the arbitration agreement was enforceable under state law, the court did have pendent jurisdiction to do so. Finally, the court held that state law was not preempted as to exempt transportation workers under the FAA and that plaintiff's claims were properly arbitrable under Washington state law. App. at 1a.

This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. Where It Found The FAA Was Inapplicable To Plaintiff As An Exempt Employee Under the Act, The Third Circuit's Determination That It Nevertheless Had Jurisdiction Under §16 Of The FAA To Review Defendant's Interlocutory Appeal Of The District Court's Denial Of Its Motion To Compel Arbitration Was Plainly Wrong And In Direct Conflict With The Positions Of Two Other Courts of Appeals.

Since the Third Circuit correctly determined that the FAA is inapplicable to plaintiff's arbitration agreement, the court did not have jurisdiction over an interlocutory appeal of the District Court's order denying defendant's motion to compel arbitration and the appeal should have been dismissed. Absent some exception, a federal court of appeals may not hear an appeal from a non-final decision of a district court. 28 U.S.C. §1291. A denial of a motion to compel arbitration is an interlocutory order which can only be appealed here if the FAA, which allows such appeals, is applicable. In this regard, §4 of the FAA states that "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." Section 16(a)(1)(B) of the FAA provides that a party may appeal from an order of the District Court denying a petition to order arbitration.

The Third Circuit agreed with the District Court that the FAA had no application here since the plaintiff was an exempt transportation worker under §1 of the Act. App. at 10a. The Court of Appeals's holding that it nevertheless had jurisdiction under section 16 of the FAA was incorrect on its face and in direct conflict with the positions of the Seventh Circuit and the Federal Circuit Courts of Appeals on this issue.

In finding jurisdiction under the FAA to hear this interlocutory appeal while at the same time finding the plaintiff was exempt from the FAA, the Court of Appeals offered the following reasoning:

> Acceptance of Palcko's argument would create the curious situation in which either all district courts' orders denying arbitration based on section 1's exemption clause would be beyond appellate review, which contradicts section 16(a)'s plain language, or the determination of our appellate jurisdiction would be contingent on the outcome of our review of the merits of the District Court's finding on the exemption question, which is precisely what we are barred from doing in the absence of appellate jurisdiction.

372 F.3d at 592.

The Third Circuit's rationales for creating jurisdiction over an otherwise unappealable interlocutory order do not withstand scrutiny. Accepting plaintiff's argument would not put the District Court's order denying arbitration "beyond

appellate review," but would appropriately only deny the Court of Appeals *interlocutory* review of the order. Full appellate review of the order denying arbitration and all other aspects of the case would be available at the conclusion of the entire case through a normal appeal under 28 U.S.C. § 1291 of the final judgment or order in the case. In fact, what "contradicts section 16(a)'s plain language" is the Third Circuit's refusal to acknowledge the obvious proposition that its authority under section 16(a) of the FAA to hear interlocutory appeals of an order denying a motion to compel arbitration applies *only if the FAA applies.* Indeed, allowing interlocutory review here of an order denying arbitration of an agreement which the Court of Appeals found was *not* covered by the FAA directly contradicts, and indeed vitiates, the overriding "plain language" of section 1 of the Act, which states "nothing herein contained shall apply to contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The Third Circuit's next concern that to find section 16(a) jurisdiction unavailable to review agreements not covered by the Act will result in its appellate jurisdiction being contingent on the outcome of its review of the merits of the District Court's findings presents a false issue which is equally unpersuasive. A full review by the Court of Appeals of the merits of the District Court's findings was not necessary to determine its appellate jurisdiction here. The only necessary finding was whether the plaintiff was an exempt worker under the FAA and therefore whether the Act applied or not to plaintiff. This was easily done, based upon the record below. In any event,

regardless of the complexity of the necessary finding, the Court of Appeals had both the authority and the duty to make the threshold determination of its jurisdiction to proceed. *See United States v. United Mine Workers of America*, 330 U.S. 258, 292, n. 57 (1947)(a court necessarily has inherent jurisdiction to determine its own jurisdiction); *Cargill Ferrous International v. Sea Phoenix MV*, 325 F.3d 695, 704 (5th Cir. 2003)("A bedrock principle of federal courts is that they have jurisdiction to determine jurisdiction") (citing, *Capron v. Van Noordeen*, 2 Cranch 126, 6 U.S. 126, 2 L.Ed. 229 (1804)).

The Third Circuit's decision in this case also directly conflicts with positions of the Seventh Circuit and Federal Circuit Courts of Appeals on this issue. In *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co.*, 84 F.3d 988 (7th Cir. 1996), the Seventh Circuit, in dismissing the employer's interlocutory appeal under the FAA of the district court's order denying arbitration because under section 1 the FAA did not apply to the exempt employees held that:

> [S]ection 1 of the Arbitration Act specifically excludes coverage -- including the jurisdiction rules of § 16 -- for 'contracts of employment of seamen, railroad employees, or any other class of employees engaged in foreign or interstate commerce.' . . . [F]or disputes involving agreements covering transportation workers, the Arbitration Act does *not* provide jurisdiction for interlocutory appeals from a district

> court's denial of a motion to compel arbitration.

84 F.3d at 993 (emphasis added). *Accord, Microchip Technology Incorporated v. U.S. Phillips Corp.*, 367 F.3d 1350, 1355, n.5 (Fed. Cir. 2004)("Of course, if section 16 [of the FAA] is inapplicable, section 1292(a)(1) continues to be inapplicable to motions to compel arbitration. *See Cent. States*, 84 F.3d at 992-93 (holding that section 1292(a)(1) did not confer jurisdiction when section 16 did not apply")).

Although the *Central States* holding was cited by plaintiff in its brief, the Third Circuit made no attempt to harmonize or distinguish the Seventh Circuit's position and, indeed, totally ignored the case in its opinion.

The Court of Appeals had no jurisdiction to review the District Court's interlocutory order and its decision should be reversed by this Court. If not reversed, the Third Circuit's decision creating interlocutory appellate jurisdiction under the FAA where the statute itself is inapplicable will guarantee additional appeals to this and other circuits, encouraging piecemeal appellate review and unnecessarily adding to the caseload of the intermediate appellate judiciary.

II. As The FAA Did Not Provide Primary Federal Jurisdiction To Hear The Interlocutory Appeal, The Court of Appeals Had No Basis To Invoke Pendent Jurisdiction To Decide Defendant's Claim That Arbitration Was Required Under Washington Law.

As section 16 of the FAA allowing an interlocutory appeal was inapplicable because plaintiff is a transportation worker exempted from the Act, there was no primary appellate jurisdiction in this case. The Third Circuit's conclusion that it nevertheless had pendent jurisdiction to review the arbitrability of plaintiff's claim under Washington state law was clearly wrong because "[t]he doctrine of 'pendent appellate jurisdiction' plainly does not apply when there is not even one issue that is properly before the court." *Rodriguez v. Handy*, 802 F.2d 817, 821 (5th Cir. 1986).

Defendant's entire interlocutory appeal should have been dismissed by the Court of Appeals for lack of jurisdiction and the court should not have addressed the merits of the District Court's decision under state law until the case was concluded and a final appealable order was entered.

III. An Agreement To Arbitrate An Employment Contract Of A Worker Excluded From Coverage Under § 1 Of The FAA Is Not Enforceable Under State Law As Congress Intended That State Law In This Area Be Preempted.

The Third Circuit erred when it rejected the District Court's conclusion that Congress' enactment of the FAA preempted state law addressing the enforceability of arbitration agreements involving exempt workers like petitioner. The Third Circuit's decision ignored the plain language of the FAA and was based on a mistaken interpretation of Congress' intent in enacting section 1 of the FAA. As this Court has made clear, in enacting the FAA, Congress sought not only "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, ... and to place such agreements upon the same footing as other contracts . . .," but evidenced by including § 1 in the statute, an intent to continue the exercise of its plenary power over the flow of commerce and maintain exclusive control over the regulation of the employment of those employees working in interstate commerce. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). The Court of Appeals, however, relying on cases which generally state that there is a strong federal policy in favor of arbitration, opined that even though plaintiff was specifically exempted from compelled arbitration by section 1 of the Act, the effect of that exemption was "'merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted.'" 372 F.3d at 595 - 596 (quoting *Mason Dixon Lines, Inc.*

v. Local Union No. 560, 443 F.2d 807 (3rd Cir. 1971)). The Third Circuit's resort to "policy" to override the plain intent of Congress does not comport with this Court's prior view of the issue. In *Rodriguez v. United States*, 480 U.S. 522 (1987), this Court noted:

> [I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . .'[there is no occasion] to examine the additional considerations of "policy". . . that may have influenced the lawmakers in their formulation of the statute.'"

480 U.S. at 526 (original emphasis).

In *Circuit City v. Adams*, 532 U.S. 105 (2001), this Court reversed the Ninth Circuit's decision that §1 of the FAA applied to all contracts of employment and, instead, held that only employment contracts of workers engaged in the movement of interstate or foreign commerce, or in work so closely related thereto as to be in practical effect part of it, were exempted by § 1 of the FAA. While this Court's decision in *Circuit City* did not directly address the issue of state law preemption raised here, the Court's reasoning and its discussion of §1 of the FAA in that case is relevant, persuasive, and, indeed, dispositive of the issue.

In *Circuit City*, the plaintiff argued that "the phrase 'engaged in commerce' should be given a broader construction than justified by its evident language . . . " 532 U.S. at 117. While it disagreed with this contention for reasons not relevant to this petition, this Court's analysis is instructive:

> We must, of course, construe the "engaged in commerce" language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose. These considerations, however, further compel that the § 1 exclusion provision be afforded a narrow construction. . . . [T]he fact that the provision is contained in a statute that "seeks broadly to overcome judicial hostility to arbitration agreements," *Allied-Bruce*, 513 U.S. at 272-273, which the Court concluded in *Allied-Bruce* counseled in favor of an expansive reading of § 2, gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage.

532 U.S. at 118-19.

The plaintiff in *Circuit City* also argued that it was irrational to presume that Congress intended that those employees who had a more direct connection to interstate commerce would be excluded under the FAA, while those employees who had a less direct connection to interstate commerce would come within

the FAA's coverage. 532 U.S. at 120. This Court rejected that argument squarely:

> We see no paradox in the congressional decision to exempt the workers over whom the commerce power was most apparent. To the contrary, it is a permissible inference that the employment contracts of the classes of workers in § 1 were excluded from the FAA precisely because of Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them. . . . As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence [seamen and railroad employees]. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.

532 U.S. at 120-21.

Consequently, this Court determined in *Circuit City* that Congress could properly reserve the right to

exert more control over the terms and conditions of those workers involved in interstate commerce, even where Congress had not enacted legislation to specifically address the terms and conditions of the employment of those workers. Quite clearly, in passing §1 of the FAA, Congress reserved for itself the right to determine the forum for employment disputes involving contracts "of any . . . class of workers engaged in interstate or foreign commerce." 9 U.S.C. § 1. *See Allied Bruce, supra,* 513 U.S. at 277 (interpreting section 2 of the FAA "as implementing Congress' *intent 'to exercise [its] commerce powers to the full'*")(emphasis added).

On the issue of preemption generally, this Court has held that "when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent it actually conflicts with federal law – that is, to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes of Congress.'" *Volt, supra,* 489 U.S. at 477. Congress enacted the FAA pursuant to its power to regulate interstate commerce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967). This Court has also held that the FAA provisions, that is, §§1 and 2, are applicable in state as well as federal court. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). To the extent any state law or policy conflicts with the FAA, it is clearly preempted. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Keating, supra,* 465 U.S. at 12. Since the FAA applies in state courts, it follows the FAA's exemption of transportation workers like plaintiff from being compelled to arbitrate their employment related claims

also applies in state courts.

It would not only be against the intent of Congress, but irrational, to hold that federal law, while specifically exempting a class of workers from arbitrating their employment disputes under the FAA, requires the same workers to be compelled to arbitrate their disputes under state law, or, as correctly stated by the District Court in this case "[e]xempting the plaintiff from arbitration under the FAA, but then requiring that she arbitrate her federal claims in accordance with state laws favoring arbitration would directly conflict with Congress's express purpose." App. at 29a-30a. Indeed, if this Court were to accept the Third Circuit's rationale that the effect of exemption from the FAA was "merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted", then all employment contracts, including the employment contracts of seamen and railroad workers, whose employment contracts are specifically covered by other federal legislation, *e.g.*, The Railway Labor Act, 45 U.S.C., § 151, *et. seq.*, would also be subject to arbitration under state law. Such a conclusion would clearly be at odds with the intent of Congress, as found by this Court, to reserve to itself the power to regulate the employment contracts of workers in interstate commerce.

In summary, if the Third Circuit's decision is allowed to stand, the section 1 exemption of the FAA for transportation workers such as plaintiff will be rendered a nullity where state law compels arbitration -- a result clearly not intended by Congress.

CONCLUSION

The Third Court of Appeals was without jurisdiction under section 16 of the FAA to hear the interlocutory appeal of the District Court's order denying defendant's petition to compel arbitration because plaintiff is a transportation worker whose arbitration agreement is exempt from the provisions of the FAA. Moreover, having no primary federal appellate jurisdiction, the Court of Appeals could not invoke pendent jurisdiction to consider defendants' claim of arbitrability under Washington state law. Finally, even if the Court of Appeals had jurisdiction, Congress clearly intended to preempt state law compelling any worker exempt under the Act from arbitrating their employment claims.

The Third Circuit's decision here ignores the plain language and meaning of the FAA, is at variance with positions of other Courts of Appeals, and conflicts with the decisions of this Court. This Court should grant certiorari to resolve the important issues of appellate jurisdiction and preemption raised by this case.

Respectfully submitted,

RICHARD A. SPRAGUE, ESQUIRE
Counsel of Record
DAVID L. DACOSTA, ESQUIRE
JOSEPH J. MCALEE, ESQUIRE
TYLER E. WREN, ESQUIRE
SPRAGUE & SPRAGUE
The Wellington Building
135 So. 19th Street
Suite 400
Philadelphia, PA 19103
(215) 561-7681
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 03-2227

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARGARET PALCKO

v.

AIRBORNE EXPRESS, INC.,
Appellant

January 12, 2004, Argued
June 18, 2004, Filed

COUNSEL: Sharon M. Erwin (Argued), Law Offices of Sharon M. Erwin, LLC, Philadelphia, PA, Attorney for Appellant.

David L. DaCosta (Argued), Joseph J. McAlee, Sprague & Sprague, Philadelphia, PA, Attorneys for Appellee.

JUDGES: Before: SLOVITER, RENDELL, and ALDISERT, Circuit Judges.

OPINION BY: SLOVITER

OPINION: OPINION OF THE COURT

SLOVITER, Circuit Judge.

The principal questions before us on this appeal are the scope of the exclusion from the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (2004), for a "class of workers engaged in foreign or interstate commerce" and the preemptive effect, if any, of the statutory exclusion.

I.

Defendant Airborne Express, Inc. ("Airborne") appeals from the District Court's order dated April 23, 2003 denying Airborne's motion to compel arbitration of plaintiff Margaret Palcko's claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e (2004), and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 (2004). Airborne contends that Palcko is required to arbitrate her claims pursuant to a contractual arbitration agreement based on the FAA and Washington state law. Its appeal challenges the District Court's rulings that Palcko, as a transportation worker engaged in interstate commerce, is excluded from the FAA's coverage, and that this FAA exemption preempts enforcement of Palcko's arbitration agreement with Airborne under Washington state law.

II.

Airborne is a package transportation and delivery company that engages in intrastate, interstate, and international shipping. It began employing Palcko as a Field Services Supervisor in Philadelphia in 1998. Palcko's duties included supervising between thirty and thirty-five drivers who delivered packages from Airborne's facility near the Philadelphia International Airport to their ultimate destinations in the

Philadelphia area, and picked up packages from customers in the Philadelphia area and brought them back to Airborne's facility for shipment. Palcko monitored and improved the performance of the drivers under her supervision to ensure timely and efficient delivery of packages.

When Palcko was hired, she agreed to enter into a "Mutual Agreement to Arbitrate Claims" with Airborne. The relevant portions of the Agreement, which covers "all claims," provides:Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply.App. at 19.

According to Palcko, once she began performing her duties at Airborne she encountered immediate resistance and hostility from the drivers under her supervision. She alleges that other Airborne employees falsely accused her of sexual misconduct, verbally and physically intimidated her during work, created a hostile work environment through sexist remarks, spread offensive rumors about her sex life and moral character through Airborne's internal communications system, and generally discriminated against her because of her gender. Pl.'s Compl. at 3-7. Palcko contends that Airborne did not meaningfully investigate and address these incidents, which she reported to the company management. According to Palcko, when her immediate supervisor, Michael Matey, told her in the presence of others during a March 5, 2001 meeting that "maybe you don't belong in this

industry" and "maybe you should just leave," she left the meeting and never returned to her position at Airborne. Pl.'s Compl. at 7. Airborne denies all Palcko's factual allegations of company wrongdoing. Def.'s Answer at 3-6.

Palcko filed a charge against Airborne with the Equal Employment Opportunity Commission on May 31, 2001, seeking administrative remedies for her allegations under Title VII, 42 U.S.C. § 2000e-5. After 180 days elapsed without a finding by the Commission on Palcko's charge against Airborne, she requested a Dismissal and Notice of Rights from the Commission. 42 U.S.C. § 2000e-5(f)(1). The Commission issued the Dismissal and Notice, thereby exhausting Palcko's administrative remedies and allowing her to seek judicial recourse.

Palcko filed a complaint against Airborne in the District Court for the Eastern District of Pennsylvania on May 20, 2002 under Title VII and the Pennsylvania Human Relations Act. After the parties resolved issues unrelated to this appeal pertaining to the service of process, Airborne filed a motion to compel arbitration of Palcko's claims under the parties' arbitration agreement. The District Court denied Airborne's motion on April 24, 2003, holding that Palcko's employment contract is "excluded from the coverage of the FAA because of the nature of her work." App. at 14, 17-18. The court also found that the exclusionary effect of the FAA preempts alternative enforcement of the arbitration contract under Washington state law, as such enforcement "would directly conflict with Congress's express purpose" of exempting a certain class of workers "from a federal law otherwise favoring

arbitration." App. at 18. Airborne now appeals from the District Court's order.

III.

A. The Federal Arbitration Act

1. Jurisdiction

The District Court had subject matter jurisdiction over Palcko's Title VII claim under 28 U.S.C. §§ 1331, 1343. The FAA, 9 U.S.C. § 16(a), provides for appellate jurisdiction over Airborne's appeal from the District Court's order denying its motion to compel arbitration. n1 Brayman Constr. Corp. v. Home Ins. Co., 319 F.3d 622, 624-25 (3d Cir. 2003). Palcko contends, however, that because the District Court found Palcko's employment contract to be exempt from the FAA, we have no jurisdiction to review that court's denial of Airborne's motion to compel arbitration under 9 U.S.C. § 16(a), which is a section of the FAA. Appellee's Br. at 1.

Palcko's contention is without merit. We have held in Sandvik AB v. Advent International Corporation, 220 F.3d 99 (3d Cir. 2000), that the FAA's provision for interlocutory appeals of orders denying motions to compel arbitration clearly endows us with appellate jurisdiction even in instances when the validity of the underlying contract to arbitrate is in doubt, as in Palcko's case with respect to the arbitration agreement's reference to the FAA. See id. at 100 (stating that the FAA's "plain language contemplates interlocutory appeals from orders" denying arbitration because of questions related to the validity of the

underlying contract, and that "other parts of the statute evince clear Congressional intent that challenges to refusals to compel arbitration be promptly reviewed by appellate courts").

Acceptance of Palcko's argument would create the curious situation in which either all district courts' orders denying arbitration based on section 1's exemption clause would be beyond appellate review, which contradicts section 16(a)'s plain language, or the determination of our appellate jurisdiction would be contingent on the outcome of our review of the merits of the District Court's finding on the exemption question, which is precisely what we are barred from doing in the absence of appellate jurisdiction. As we stated in Sandvik, "The more natural reading [of Section 16(a) is] to treat all orders declining to compel arbitration as reviewable." Id. at 103. No appellate court has held to the contrary.

Our jurisdiction over the District Court's order here, therefore, is clear.

2. Exemption Under Section 1 of the FAA

Section 1 of the FAA provides:. . . Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.9 U.S.C. § 1.

In Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001), the Supreme Court considered the scope of this exemption from the FAA. The employer in that case, Circuit City, sought to

compel arbitration as provided for in its employment contracts. The Ninth Circuit held that arbitration was not appropriate because section 1 of the FAA exempts from its coverage all employment contracts. The Supreme Court reversed, rejecting the Ninth Circuit's expansive reading of section 1. The Court noted that "most Courts of Appeals conclude the exclusion provision is limited to transportation workers, defined, for instance, as those workers 'actually engaged in the movement of goods in interstate commerce.'" Id. at 112 (citing Cole v. Burns Int'l Security Servs., 323 U.S. App. D.C. 133, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). Looking to the statutory language, the Court applied the interpretation maxim of ejusdem generis and read the words "any other class of workers engaged in . . . commerce," as giving "effect to the terms 'seamen' and 'railroad employees.'" Circuit City, 532 U.S. at 115. The Court held that the residual phrase "any other class of workers engaged . . . in interstate commerce" should "be controlled and defined by reference to the enumerated categories of workers which are recited just before it . . . ." Id. at 115. Reading section 1 in this narrow manner, the Court noted, also concurs with Congress's intent in enacting the FAA to compel enforcement of arbitration agreements in response to then-prevalent judicial hostility toward such agreements, especially given the fact that more specific and comprehensive federal arbitration procedures for seamen and railroad employees were already in existence or on the verge of passage. See id. at 121 ("It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.") (citation omitted).

To determine whether Palcko's employment contract, including the arbitration agreement, is exempt from the FAA's coverage, we must therefore determine whether Palcko can be considered to be a "transportation worker" in a "class of workers . . . engaged in . . . commerce" within the meaning of the FAA, as interpreted by Circuit City. The District Court, citing our decision in Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, 207 F.2d 450, 452 (3d Cir. 1953), reasoned that Palcko qualifies as a transportation worker because her job "was so closely related [to the transport of the goods] as to be in practical effect part of [the shipping of the goods]." App. at 17 (internal quotations omitted). Airborne challenges the court's finding, arguing that Palcko, as a "management employee" with no close contact with channels of interstate commerce and not subject to other existing statutory employment dispute resolution schemes, cannot qualify as an exempt worker under section 1 of the FAA. Appellant's Br. at 27-36.

Fifty years ago, this court in Tenney was required to construe the meaning of the exception clause in the context of a labor dispute. The union sought a stay pending arbitration which was provided in the collective bargaining agreement. The parties stipulated that the employer was engaged in the manufacture of goods for sale in interstate commerce and that the employees were engaged in that manufacture and incidental plant maintenance. Presaging the Supreme Court's holding in Circuit City, we held that the exception was inapplicable. We stated that as the language "any other class of workers engaged in foreign or interstate commerce" followed seamen and railroad workers, the rule of ejusdem generis demands

that the phrase includes "only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." Tenney, 207 F.2d at 452. The Supreme Court's later decision in Circuit City essentially affirmed the Tenney analysis. 532 U.S. at 119.

Adopting the narrow interpretation of section 1 stated in Tenney and Circuit City, Airborne argues that Palcko's work, as a supervisor, was not only dissimilar to that of seamen or railroad workers, but also did not directly involve the interstate delivery of packages. She therefore cannot be a "transportation worker" in the sense envisioned by the Court in Circuit City. We do not agree. According to Palcko's affidavit, she was responsible for "monitoring and improving the performance of drivers under my supervision to insure [sic] timely and efficient delivery of packages." App. at 67. Such direct supervision of package shipments makes Palcko's work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it." Tenney, 207 F.2d at 452; see generally Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 226-27 (3d Cir. 1997) (declaring that Tenney is still good law).

Airborne suggests that the exemption clause should be limited to those truck drivers who physically move the packages. If we were to accept that limitation, we would unnecessarily narrow the section 1 exemption in a way never intended by the FAA; had Congress intended the residual clause of the exemption to cover only those workers who physically transported goods

across state lines, it would have phrased the FAA's language accordingly. n2 We therefore concur with the District Court's finding that Palcko's employment contract with Airborne is exempt from the FAA's coverage because she is a transportation worker engaged in interstate and foreign commerce under section 1 of that statute.

B. The FAA's Preemptive Effect over Washington State Law Governing Arbitration

1. Jurisdiction

Airborne also argues that even if its arbitration agreement with Palcko is exempt from the FAA's coverage, the agreement is nonetheless enforceable under the alternative ground that the arbitration agreement is valid under Washington state law. Before we examine the merit of Airborne's argument, however, we must first ascertain whether there is a basis for our jurisdiction to inquire into this state-law claim.

The District Court exercised supplemental jurisdiction over Palcko's Pennsylvania state law cause of action under 28 U.S.C. § 1367, and issued an order denying Airborne's motion to compel arbitration on both FAA and Washington state law grounds. While we may review Airborne's appeal with respect to the FAA under 9 U.S.C. § 16(a), that section does not cover our review of a non-FAA, state-law arbitration claim in an otherwise nonappealable interlocutory order. Our ability to review the Washington state law issue before us, if any, must therefore rest on the doctrine of

pendent appellate jurisdiction, which is discretionary and narrow in nature.

In E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187 (3d Cir. 2001), we explained that "the doctrine of pendent appellate jurisdiction, in its broadest formulation, allows an appellate court in its discretion to exercise jurisdiction over issues that are not independently appealable but that are intertwined with issues over which the appellate court properly and independently exercises its jurisdiction." Id. at 202-03. Recognizing that the Supreme Court has endorsed, but also limited, the use of pendent appellate jurisdiction by Courts of Appeals, we concluded that "the doctrine should be used 'sparingly,' and only where there is sufficient overlap in the facts relevant to both the appealable and nonappealable issues to warrant plenary review." Id. at 203 (emphasis in original).

Here, both the FAA exemption and Washington state law issues arise from a single arbitration agreement that provides alternative grounds for the arbitration of all claims arising from Palcko's employment with Airborne. Moreover, both Palcko's Title VII and Pennsylvania Human Relations Act claims arise from the same set of facts related to her conditions as an Airborne employee. Thus, not only does sufficient overlap of facts exist to warrant plenary review, but the Washington state law arbitration issue is so closely intertwined with the FAA claim that our taking of pendent appellate jurisdiction over the former is necessary to ensure meaningful review of the District Court's order in its entirety. We therefore conclude we

may exercise pendent appellate jurisdiction over the state-law portion of the District Court's order.

2. Discussion

The District Court ruled that the exemption of Palcko's employment contract from the FAA's coverage also precludes enforcement of the arbitration agreement under Washington state law. The court found that "although the FAA contains no express preemptive provision and its preemptive effect is limited, its preemptive effect does encompass questions of arbitrability." App. at 17. It reasoned that enforcement of the arbitration agreement between Palcko and Airborne "in accordance with state laws favoring arbitration would directly conflict with Congress's express purpose," in drafting the exemption clause in section 1 of the FAA, of exempting workers engaged in interstate commerce from arbitration. App. at 18.

In considering whether the inclusion of the exemption clause was intended to preempt state law regarding enforcement of arbitration agreements, we must keep in mind that Congress enacted the FAA "to ensure judicial enforcement of privately made agreements to arbitrate," rather than restrict the force of arbitration agreements. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985). The Supreme Court has stated that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and [courts] must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation."

Id. at 220 (footnote omitted). In seeking to fulfill the FAA's purpose, the Court has enforced an agreement to arbitrate claims under the Securities Act of 1933, even though prior case law stated that the Securities Act's language prohibits the arbitration of such claims. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989) (overruling Wilko v. Swan, 346 U.S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953)); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (enforcing arbitration clause in a securities registration application to cover an Age Discrimination in Employment Act claim). In doing so, the Supreme Court has held that the FAA represents a "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). The Court has also stated that parties to an arbitration agreement, "having made the bargain to arbitrate . . . should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985).

There is no language in the FAA that explicitly preempts the enforcement of state arbitration statutes. As the Supreme Court explained in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989), "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Id. at 477 (citing Bernhardt v. Polygraphic Co., 350 U.S. 198,

100 L. Ed. 199, 76 S. Ct. 273 (1956), which upheld application of state arbitration law to an arbitration provision in a contract not covered by the FAA). The Volt Court, in determining whether to enforce an arbitration agreement using a California procedural rule that has no counterpart in the FAA, stated that "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Id. at 476. The Court then ruled that the application of the California procedural rule to stay arbitration to the agreement, in accordance with a choice-of-law provision contained therein, is appropriate because while "state law may nonetheless be pre-empted [by the FAA] to the extent that it actually conflicts with federal law - that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the application of the state procedural rule, "in accordance with the terms of the arbitration agreement itself, would [not] undermine the goals and policies of the FAA." Id. at 477-78 (internal quotations and citations omitted).

Applying the Supreme Court's precedent, we conclude that the District Court erred in holding that Palcko's exemption status under section 1 of the FAA preempts the enforcement of the arbitration agreement under Washington state law. It is telling that the arbitration agreement itself envisioned the possibility that Palcko's employment contract would be deemed exempt from the FAA's coverage under section 1 of the Act. It provided for that contingency by including the following: "To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to

agreements to arbitrate shall apply." App. at 19. We see no reason to release the parties from their own agreement. We stated in Mason-Dixon Lines, Inc. v. Local Union No. 560, 443 F.2d 807 (3d Cir. 1971), "In our view, the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted." Id. at 809. n3 Here, enforcement of the arbitration agreement between Palcko and Airborne under Washington state law, as if the FAA "had never been enacted," does not contradict any of the language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration. We will therefore remand so that the District Court can take the actions necessary to enforce the arbitration agreement under Washington state law.

C. Whether Airborne Waived Its Right to Arbitration

Palcko also argues on appeal that Airborne has waived its right to arbitration by failing to include it in its initial motion to dismiss on the ground of alleged defective service of process under Federal Rule of Civil Procedure 12(b). Palcko's argument is unpersuasive. Rule 12 deals with defenses and objections by pleading or motion. The relevant portions of Rule 12, for Palcko's purposes, are as follows:(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5)

insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any

pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.Fed. R. Civ. P. 12(b), (g), (h).

Palcko contends that although motions to dismiss based on the existence of an arbitration agreement are most commonly filed under Rule 12(b)(1) (lack of subject matter jurisdiction) or Rule 12(b)(6) (failure to state a claim upon which relief can be granted), that practice is inappropriate and that motions to dismiss based on an arbitration agreement are more appropriately brought under Rule 12(b)(2) (lack of personal jurisdiction) or Rule 12(b)(3) (improper venue). n4 Appellee's Br. at 14. Palcko's novel categorization of the arbitration agreement claim is critical to her waiver argument because motions under Rule 12(b)(1) and (b)(6) are not waived under Rule 12(h)(1), but motions under Rule 12(b)(2) and (b)(3) are.

Existing legal authorities do not support Palcko's creative theory. The only support Palcko has cited is a Pennsylvania state court decision interpreting Pennsylvania state rules of civil procedure. Wilk v. Ravin, 46 Pa. D. & C. 4th 347 (Ct. Com. Pl. Allegheny County 1991); Appellant's Reply Br. at 13. Wilk is of little relevance to interpretation of federal procedural rules. Our prior decisions support the traditional practice of treating a motion to compel arbitration as a motion to dismiss for failure to state a claim upon which relief can be granted. See Nationwide Ins. Co. v. Patterson, 953 F.2d 44, 45 n.1 (3d Cir. 1991) ("Dismissal of a declaratory judgment action because the dispute is covered by an arbitration provision is generally effected under Rule 12(b)(6) covering dismissals for failure to state a claim upon which relief can be

granted,see, e.g., Aetna Casualty & Surety Co. v. Hameen, 758 F. Supp. 1049 (E.D. Pa. 1990), ...").

Allowing a waiver of the right to arbitration based on Rule 12(h)(1) would undermine the strong judicial posture favoring arbitration as discussed above. Our precedent holds that waiver of arbitration rights "is not to be lightly inferred" by federal courts. PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1068 (3d Cir. 1995) (quoting Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975)). We have also stated that "prejudice is the touchstone for determining whether the right to arbitrate has been waived." Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 925 (3d Cir. 1992); see also Thyssen, Inc. v. Calypso Shipping Corp., 310 F.3d 102 (2d Cir. 2002) (ruling that no waiver exists even though defendant did not seek arbitration until more than eighteen months after the suit was filed and after plaintiff filed a motion for partial summary judgment).

Although we found prejudice in Hoxworth because defendants had engaged in extensive pretrial practice (including filing a motion to dismiss for failure to state a claim) in the more than eleven months prior to filing a motion to compel arbitration, Hoxworth, 980 F.2d at 925, nothing in the record suggests that Palcko has suffered a similar adverse effect here. Airborne filed its motion to compel arbitration within thirty-eight days of learning of the lawsuit and within roughly twenty-two days of filing its initial motion to dismiss for insufficiency of service of process. Appellant's Reply Br. at 12 n.2. Airborne had also requested that Palcko voluntarily agree to arbitration ten days before filing its motion to compel arbitration. Appellant's Reply Br.

at 14. Although the length of the time period involved alone is not determinative, Palcko has failed to show what adverse effects, if any, she has suffered within that short period of time. Therefore waiver cannot be inferred from the facts of this case.

IV.

For the above reasons, we will reverse the order of the District Court denying enforcement of the arbitration agreement under Washington state law and remand for further proceedings consistent with this opinion.

Footnotes

n1 9 U.S.C. § 16(a) states:(a) An appeal may be taken from-

(1) an order-

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or

modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

n2 We are not persuaded by Airborne's suggestion that the inclusion of Palcko in the class of workers exempt from the FAA's coverage would create a "slippery slope" problem that would ultimately lead to the exemption of all "management employees" in the same chain of command. Palcko was a direct supervisor of Airborne's drivers that transported packages, and our decision is based only on her particular relations to the channels of interstate commerce. In this regard Palcko's situation differs from the employee litigants in Cole, 105 F.3d at 1469, and Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D. Md. 1994); neither the railroad security guard in Cole nor the warehouse manager in Kropfelder was a transportation worker, let alone engaged in the transportation of goods interstate.

n3 Although Mason-Dixon Lines involved the different issue of staying judicial proceedings pending arbitration under an agreement excluded from section 1 of the FAA, the principle we put forth in that case regarding the exclusionary effect of section 1 on other arbitration issues not related to the FAA is equally applicable here. The case also demonstrates that enforcing the arbitration agreement under Washington state law does not contradict our finding above that Palcko's employment contract, of which the arbitration agreement is a part, is exempted from the FAA's coverage.

n4 Improper venue claims fall within Rule 12(b)(3); Palcko incorrectly cited Rule 12(b)(4).

CIVIL ACTION NO. 02-2990

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET PALCKO

v.

AIRBORNE EXPRESS, INC.

April 23, 2003, Decided
April 24, 2003, Filed, Entered

COUNSEL: For MARGARET PALCKO, Plaintiff: DAVID L. DACOSTA, JOSEPH J. MCALEE, SPRAGUE & SPRAGUE, PHILADELPHIA, PA.

For AIRBORNE EXPRESS, INC., Defendant: SHARON M. ERWIN, LAW OFFICES OF SHARON M. ERWIN, LLC, PHILADELPHIA, PA.

JUDGES: THOMAS N. O'NEILL, JR., J.

OPINIONBY: THOMAS N. O'NEILL, JR.

OPINION:

MEMORANDUM

O'NEILL, J.

APRIL 23, 2003

Plaintiff was hired by defendant, Airborne Express, Inc., a package delivery and shipping company, on October 12, 1998, as a Field Services Supervisor at its Philadelphia facility. Upon her hiring, plaintiff signed a contract which included an "Agreement to Arbitrate" clause which required all signatories to submit all disputes to arbitration.

Plaintiff directly supervised between 30-35 drivers who delivered packages from Airborne's terminal to their ultimate destination in the Philadelphia area and picked up packages from customers in the area and brought them back to Airborne's facility near the Philadelphia International Airport for shipment. She was responsible for monitoring and improving the performance of the drivers under her supervision to ensure timely and efficient delivery of packages.

As plaintiff tried to improve efficiency and implement other workplace changes, she met resistance from the drivers and their Union, Teamsters Local 107. This alleged resistance included false accusations of plaintiff's sexual misconduct and spreading rumors about her sex life, physical intimidation and vandalizing her car, lewd and obscene references to women, and comments that women did not belong in the workplace. At a management meeting on March 5, 2001, plaintiff complained about sexual harassment. Plaintiff contends that defendant did not meaningfully consider her concerns during the meeting and she became frustrated. Plaintiff left the meeting and did not return to her position.

Defendant has not challenged plaintiff's assertion that she timely filed a charge with the Equal Employment

Opportunity Commission ("EEOC") on May 31, 2001, alleging that defendant discriminated against on the basis of her sex in violation of Title VII, 42 U.S.C. 2000e, et seq. and the Pennsylvania Human Rights Act ("PHRA"), 43 P.S. § 962(c). The EEOC issued its right to sue letter to plaintiff on February 27, 2002. n1 Plaintiff then filed this action alleging violations of Title VII and the PHRA. Presently before me is defendant's Motion to Compel Arbitration.

DISCUSSION

Defendant seeks to compel arbitration of plaintiff's claims pursuant to the "Agreement to Arbitrate Claims" plaintiff signed upon being hired by defendant as well as the dictates of the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1, et seq. If plaintiff's claims fall within the scope of the arbitration agreement, the case must be dismissed. See Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 179 (3d Cir. 1998)(holding that if all claims involved in a suit are subject to binding arbitration, then the court should dismiss the suit).

The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues, should be resolved in favor of arbitration." Moses H. Cone Hospital v. Mercury Construction, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000). A claim is arbitrable if there is an agreement to arbitrate, there has been no waiver of te right to arbitrate, and the claims fall within the scope of the agreement. Laborers' Int'l Union of North America, AFL-CIO v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989). Plaintiff contends that the FAA does not apply to her

because she falls within the FAA's exemption for the class of workers closely related to the movement of interstate commerce. n2

First, as a threshold matter, whether a dispute is subject to a grievance and arbitration procedure is a matter of contract between the parties. See Trap Rock Indus., Inc. v. Local 825 Int'l Union of Operating Eng'rs, 982 F.2d 884, 888 (3d Cir. 1992). Additionally, civil rights actions such as the one brought by plaintiff are subject to the enforcement mandate of the FAA, 9 U.S.C. § 2. See, e.g. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001)(compelling arbitration of plaintiff's employment discrimination claims); Wright v. Universal Maritime Serv. Corp, 525 U.S. 70, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)(holding that statutory claims may be the subject of an arbitration agreement unless Congress clearly intended to preclude that result); Seus, 146 F.3d at 182 (stating that "the text of the Civil Rights Act of 1991 evinces a clear Congressional intent to encourage arbitration of federal discrimination claims"); Underwood v. Chef Fransico/Heinz, 200 F. Supp. 2d 475, 478-79(E.D. Pa. 2002)(Title VII claims are subject to FAA).

The primary question here is whether plaintiff's employment contract, including the arbitration agreement, is within the scope of the FAA. Section 1 expressly excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

An expansive reading of § 1 could encompass virtually all contracts of employment given the broad implications of the term "interstate commerce." However, in Circuit City, the Supreme Court narrowed the FAA's exemption for "workers engaged in foreign or interstate commerce" to include only workers engaged in the movement of goods as transportation workers. 532 U.S. at 112, 117. In so holding, the Supreme Court appeared to endorse the Third Circuit's approach that the FAA applies "only to those classes of workers directly engaged in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." Tenney Eng'g, Inc. v. United Elec., Radio & Mach. Workers of Am., Local 437, 207 F.2d 450, 452 (3d Cir. 1953); see also Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997) (stating that Tenney Eng'g is still good law and that the "only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself").

The question remains whether plaintiff should be excluded from the coverage of the FAA because of the nature of her work. The Third Circuit has never considered the scope of § 1's exemption in a context similar to the instant case.

Defendants rely on the Congressional intent underlying the FAA to contend that plaintiff is not exempt from the FAA's coverage because no special statutory dispute resolution mechanism applies to plaintiff. In Circuit City, the Supreme Court inferred that Congress

excluded "seamen" and "railroad employees" to prevent disrupting existing statutory arbitration schemes already in place for those industries. Circuit City Stores, Inc. v. Adams, 530 U.S. 105, 120-21, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001). However, decisions by other courts indicate that workers besides those covered under other statutory arbitration statutes are also exempted as long as they are engaged in conduct directly involving the actual transportation or movement of goods.

For example, a plaintiff who directly transported goods in interstate commerce falls within the FAA's exemption. See Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001)(holding that an individual truck driver who provided courier service to deliver packages throughout the United States was a transportation worker engaged in interstate commerce and exempted from an arbitration agreement). Moreover, the Sixth Circuit has held that a worker, even one who did not directly transport goods, falls into the FAA's exemption because the employee belongs to a class of workers engaged in interstate commerce. See Bacashihua v. United States Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988)(exempting from the FAA a parcel post mail distributor at a Bulk Mail Center who did not directly deliver mail or packages); see also American Postal Workers Union, AFL-CIO v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987)(determining that postal workers, who are "responsible for dozens, if not hundreds, of items of mail moving in 'interstate commerce' on a daily basis, fall within the purview of the FAA's exemption).

Meanwhile, courts have excluded from the FAA's exemption employees who, although employed in jobs with close ties to interstate commerce and transportation, were not "actually engaged in the movement of goods." See Perez v. Globe Airport Sec. Servs., 253 F.3d 1280, 1283-84 (11th Cir. 2001)(excluding a pre-departure security agent at an international airport from the FAA's exemption because she merely inspected or guarded goods in interstate commerce prior to their transport but did not actually transport them); Cole v. Burns Int'l Sec. Servs., 323 U.S. App. D.C. 133, 105 F.3d 1465, 1471 (D.C. Cir. 1997)(holding that a security guard at a train station did not fall into FAA's exemption because he did not participate in the actual movement of goods in commerce); Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952, 958-59 (D. Md. 1994)(excluding a warehouse worker who packaged, unloaded, and loaded products trucked to and from a distributor's warehouse from the FAA's exemption because employee's relationship to interstate commerce was not sufficiently similar to that of seamen or railway workers).

Here, defendant is an interstate shipping company responsible for moving packages and bulk goods in interstate commerce. According to plaintiff's affidavit, she worked as a supervisor at defendant's Philadelphia facility, overseeing between 30-35 delivery drivers directly responsible for moving the goods. She was directly involved in a transportation business engaged in the channels of interstate commerce. As she oversaw the actual delivery of goods, her role was more akin to that of a truck driver or postal employee than that of a security guard at an airport or a warehouse employee. Although plaintiff did not personally move the goods in

interstate commerce, she monitored and ensured the efficient delivery of those goods. Because she oversaw the delivery of goods, her job was "so closely related [to the transport of the goods" as to be in practical effect part of [the shipping of the goods]" and she should be considered a transportation worker. Tenney, 207 F.2d at 452. Accordingly, the "engaged in commerce" exemption applies and the FAA does not govern this dispute.

Finally, defendants contend that even if plaintiff is not covered by the FAA "her agreement to arbitrate employment disputes with [defendant] remains subject to mandatory arbitration because the agreement is enforceable under state law." Although the FAA contains no express preemptive provision and its preemptive effect is limited, its preemptive effect does encompass questions of arbitrability. Great Western Mortgage Corp., 110 F.3d at 230; see also Bradley v. Harris Research, Inc., 275 F.3d 884, 888-89 (9th Cir. 2001)(state law "may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'")(quoting Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Standford Jr. Univ., 489 U.S. 468, 474, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989)(quoting Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)).

Congress explicitly exempted a class of workers, those "engaged in interstate commerce," from a federal law otherwise favoring arbitration. Exempting the plaintiff from arbitration under the FAA, but then requiring that she arbitrate her federal claims in accordance with

state laws favoring arbitration would directly conflict with Congress's express purpose. Accordingly, plaintiff's claims will be allowed to proceed in this court. An appropriate Order follows.

ORDER

AND NOW, this 23 day of April, 2003, upon consideration of defendant's Motion to Compel Arbitration (Doc. # 12) and plaintiff's response thereto, consistent with the accompanying memorandum, IT IS HEREBY ORDERED that said Motion is DENIED.

BY THE COURT:

THOMAS N. O'NEILL, JR., J.

Footnotes

n1 Plaintiff asserts that she requested the EEOC to provide her with a Dismissal and Notice of Rights on February 12, 2002, on the ground that 180 days had elapsed since she initially filed her Charge of Discrimination and the EEOC had not yet made a finding.

n2 Plaintiff also asserts that the "Agreement to Arbitrate" is invalid under state law. However, I need not consider this issue.

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §§ 1, 2, 4, 16

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the

party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 16. Appeals

(a) An appeal may be taken from -

(1) an order -

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(2)

No. 04-392

Supreme Court, U.S.
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARGARET PALCKO,

Petitioner,

v.

AIRBORNE EXPRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AIRBORNE EXPRESS, INC.

Sharon M. Erwin
Counsel of Record
Hugh B. Gordon
LAW OFFICES OF
SHARON M. ERWIN, L.L.C.
3130 West Penn Street
Philadelphia, PA 19129
(215) 438-8813

Counsel for Respondent

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

COUNTER STATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit had jurisdiction to review the District Court's holding that § 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), preempts state law favoring the enforcement of arbitration agreements in an interlocutory appeal of an order denying a motion to compel arbitration under § 4 of the FAA.[1]

---

[1] Petitioner raised three (3) questions in her Petition for Writ of Certiorari ("Petition"), to which Respondent waived its right to file a brief in opposition on the ground that the case did not warrant review by this Court. Respondent respectfully submits this Brief in Opposition in response to the Court's request for a response only to Question 2 raised in the Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Airborne Express, Inc. is a wholly owned subsidiary of Airborne, Inc. Airborne, Inc. is a wholly owned subsidiary of DHL Holdings (USA), Inc. DHL Holdings (USA), Inc. is an indirect subsidiary of Deutsche Post AG. The stock of Deutsche Post is publicly traded in Europe but not in the United States.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTION PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE COURT OF APPEALS DID NOT DECIDE AN ISSUE OF STATE LAW AS SUGGESTED BY PETITIONER'S STATEMENT OF THE QUESTION 4

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' EXERCISE OF PENDENT APPELLATE JURISDICTION, BASED ON THE UNIQUE CIRCUMSTANCES OF THIS CASE, IS CONSISTENT WITH THE GUIDANCE OF THIS COURT AND WITH CONTROLLING PRECEDENT 5

A. The Court of Appeals Correctly Held That It Had Primary Jurisdiction Over The District Court's Order Under the Plain Language of § 16(a) of the FAA 5

B. It Was Proper for the Court of Appeals to Exercise Its Jurisdiction Over the District Court's Order in Its Entirety 9

1. The Court of Appeals Properly Stated the Permissible Applicable Law of Pendent Appellate Jurisdiction 9

2. The Court of Appeals Properly Exercised Pendent Appellate Jurisdiction Because of the Overlapping Facts Warranting Plenary Review, the Closely Intertwined Issues and the Need to Meaningfully Review the Appealable Order 11

C. The Court of Appeals' Exercise of Jurisdiction In This Case Is Consistent With and Harmonizes the Multiple Federal and State Policies and Interests at Stake 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases:

Bernhardt v. Polygraphic Company,
350 U.S. 198 (1956).....13, 14

Boomer v. AT&T Corporation,
309 F.3d 404 (7th Cir. 2002).....7, 8

Central States, Southeast and Southwest Areas
Pension Fund v. Central Cartage Company,
84 F.3d 988 (7th Cir. 1996).....7, 8

Clinton v. Jones,
520 U.S. 681 (1997).....9, 10, 12

Cole v. Burns International Security Services,
105 F.3d 1465 (D.C. Cir. 1997).....14

CTF Hotel Holdings, Inc. v. Marriott International, Inc.,
381 F.3d 131 (3d Cir. 2004).....12, 13

E.I. Dupont De Nemours and Company v.
Rhone Poulenc Fiber and Resin Intermediates, S.A.S.,
269 F.3d 187 (3d Cir. 2001).....10

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995).....15

Great Western Mortgage Company v. Peacock,
110 F.3d 222 (3d Cir.), *cert. denied,*
522 U.S. 915 (1997).....14

Gulfstream Aerospace Corporation v. Mayacamas Corporation,
485 U.S. 271 (1988) 6

Harden v. Roadway Packages Systems, Inc.,
249 F.3d 1137 (9th Cir. 2001) 14

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 7

In re Montgomery County,
215 F.3d 367 (3d Cir. 2000), *cert. denied,*
531 U.S. 1126 (2001) 10

Kansas Gas & Electric Company v. Westinghouse,
861 F.2d 420 (4th Cir. 1988) 13

Kilburn v. Socialist's People's Libyan Arab Jamahiriya and Libyan External Security Organization,
376 F. 3d 1123 (D.C. Cir. 2004) 10-11

Koveleskie v. SBC Capital Markets, Inc.,
167 F.3d 361 (7th Cir.), *cert. denied,*
528 U.S. 811 (1999) 7

McLaughlin Gormley King Company v. Terminix International Company, L.P.,
105 F.3d 1192 (8th Cir. 1997) 7

Medtronic, Inc. v. Lora Lohr et Vir Lora Lohr,
518 U.S. 470 (1996) 14

Microchip Technology Incorporated v. U.S. Phillips Corporation,
367 F.3d 1350 (Fed. Cir. 2004) 7, 8

Nordin v. Nutri/System, Inc.,
897 F.2d 339 (8th Cir. 1990) 13

Powers v. The Southland Corporation,
4 F.3d 223, *reh'g en banc denied,*
4 F.3d 223 (3d Cir. 1993) 13

Rodriguez v. Handy,
802 F.2d 817 (5th Cir. 1986) 9

Sandvik AB v. Advent International Corporation,
220 F.3d 99 (3d Cir. 2000) 5, 7, 8

Smith v. Cumberland Group, Ltd.,
455 Pa. Super. 276,
687 A.2d 1167 (Pa. Super. 1997) 15

Smith v. Vulcan,
165 U.S. 518 (1897) 5-6

Snowden v. Checkpoint Check Cashing,
290 F.3d 631 (4th Cir.), *cert. denied,*
537 U.S. 1087 (2002) 7

Swint v. Chambers County Commission,
514 U.S. 35 (1995) 9, 10, 11, 15

Vermont Agency of Natural Resources v. United States,
162 F.3d 195 (2d Cir. 1998), *rev'd,*
529 U.S. 765 (2000) 10, 12

Volt Information Sciences, Inc. v.
Board of Trustees of Leland Stanford Junior University,
489 U.S. 468 (1989) 13-14

Constitutional Provision:

U.S. Const. amend. XI 12

Statutes:

9 U.S.C. §§ 1-16 i

9 U.S.C. § 1 ..... *passim*

9 U.S.C. § 4 ..... i, 1, 5

9 U.S.C. § 16 ..... 5, 8

9 U.S.C. § 16(a) ..... *passim*

9 U.S.C. § 16(a)(1) 7

9 U.S.C. § 16(a)(1)(B) 5

9 U.S.C. § 16(b) 5

28 U.S.C. § 1291 15

28 U.S.C. § 1292 15

28 U.S.C. § 1292(a) 9

28 U.S.C. § 1292(a)(1) 2, 6

28 U.S.C. § 1292(b) 15

28 U.S.C. §§ 2071 *et seq.* 15

42 U.S.C. § 2000e 1, 11, 15

42 U.S.C. § 12212 15

43 PA. CONS. STAT. ANN. §§ 951-963 1

WASH. REV. CODE §§ 7.04.010 15

COUNTER STATEMENT OF THE CASE

Petitioner Margaret Palcko ("Palcko"), a former management employee for Respondent Airborne Express, Inc. ("Airborne"), entered into a Mutual Agreement to Arbitrate Claims with Airborne (the "Agreement") at the time of hire, pursuant to which both parties agreed to the arbitration of all claims relating to her employment. The Agreement provides that except as it otherwise specifies:

> [T]he Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply.

Airborne, headquartered in Seattle, Washington, is a package and transportation company engaged in intrastate, interstate and international shipping. Palcko, a Field Service Supervisor for Airborne, supervised and monitored the intrastate activities of rank and file union drivers who delivered packages from a local facility near the airport to their local destinations, and picked up packages from local customers and brought them back to the facility for shipment. Palcko did not handle packages herself. (Pet'r App. 2a-3a)

In response to Palcko's Complaint asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2004), and the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (2004), and her subsequent refusal to submit her claims to arbitration as called for in the Agreement (Pet'r App. 2a, 18a), Airborne filed a Motion to Compel Arbitration in accordance with § 4 of the FAA. The District Court entered a single Order denying the Motion. (Pet'r App. 30a) The accompanying Memorandum Opinion

construed § 1 of the FAA as including Palcko within a class of workers similar to seamen and railroad employees, thereby excluding her Agreement from coverage under the FAA. The District Court also construed § 1 to preempt and prohibit the enforcement, pursuant to state law, of the arbitration agreements of excluded workers. The District Court did not reach Palcko's contention that her agreement with Airborne "is invalid under state law." (Pet'r App. 29a-30a, n.2)

Airborne timely appealed the District Court's order to the Court of Appeals, following which the District Court stayed the matter pending resolution of Airborne's Appeal. (C.A. App. 7; Order dated June 3, 2003) Based upon the single order denying its Motion to Compel Arbitration and the District Court's exclusive reliance upon its statutory construction of the § 1 exclusion to deny the Motion, Airborne initially asserted only § 16(a) of the FAA as the basis for appellate jurisdiction. (Brief of Appellant Airborne, 1) In response to the jurisdictional argument raised in Palcko's Opposition Brief, Airborne asserted alternative bases of jurisdiction in its Reply Brief, including pendent appellate jurisdiction, 28 U.S.C. § 1292(a)(1) and the collateral order doctrine. (Reply Brief of Appellant Airborne, 7-11)

The Court of Appeals identified the principal questions before it as "the scope of the exclusion from the FAA for a 'class of workers engaged in foreign or interstate commerce' and the preemptive effect, if any, of the statutory exclusion." (Pet'r App. 2a) The Court determined first that its jurisdiction over the District Court's order "is clear" under § 16(a) of FAA. (Pet'r App. 6a) It then rejected Airborne's argument that Palcko, a management employee who merely supervised the intrastate activities of drivers handling freight locally and who was not subject to a statutory employment dispute resolution scheme, is not

within a class of workers similar to seamen and railroad employees. The Court concurred with the District Court's finding that Palcko's Agreement is "exempt from the FAA's coverage because she is a transportation worker engaged in interstate and foreign commerce" under § 1 of the statute. (Pet'r App. 10a)

The Court of Appeals then stated that § 16(a) of the FAA did not cover "its review of a non-FAA, state-law arbitration claim in an otherwise unappealable interlocutory order" but determined that it could exercise pendent appellate jurisdiction, "which is discretionary and narrow in nature", to review the issue of the FAA's preemptive effect over Washington state law governing arbitration. (Pet'r App. 10a-12a) The Court further held that the District Court "erred in holding Palcko's exemption status under section 1 of the FAA preempts the enforcement of the arbitration agreement under Washington state law." (Pet'r App. 14a)

The Court of Appeals' opinion, filed on June 18, 2004, reversed the order of the District Court denying enforcement of the arbitration agreement under Washington state law and remanded for further proceedings consistent with its opinion. Petitioner filed her Petition for a Writ of Certiorari on September 16, 2004.

REASONS FOR DENYING THE WRIT

The plain language of § 16(a) of the FAA provides for the Court of Appeals' jurisdiction over the District Court's order, the Court of Appeals exercised pendent appellate jurisdiction in accordance with well-established precedent to ensure meaningful review of the order, and the decision, limited to its unique facts, correctly reverses a District Court ruling on federal preemption that has no support in legal precedent. There is no compelling reason, therefore, for this Court to grant the Petition.

I. THE COURT OF APPEALS DID NOT DECIDE AN ISSUE OF STATE LAW AS SUGGESTED BY PETITIONER'S STATEMENT OF THE QUESTION

Palcko's statement of the Question Presented incorrectly asks whether "the Court of Appeals had pendent appellate jurisdiction to review *under state law* the District Court's interlocutory order . . ." (Petition at i)(emphasis added). The Court of Appeals exercised pendent appellate jurisdiction to review whether the § 1 exclusion preempted state law favoring arbitration, a question of federal statutory construction. The District Court did not consider the provisions of state law at all. (Pet'r App. 30a, n.2) The Court of Appeals clearly stated that it was "considering whether the inclusion of the exemption clause [in § 1 of the FAA] was intended to preempt state law regarding enforcement of arbitration agreements" (Pet'r App. 12a), that is, engaging in the construction of a federal statute to determine a question of federal preemption. Palcko is not foreclosed from raising issues about the enforceability of the Agreement under state law on remand.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' EXERCISE OF PENDENT APPELLATE JURISDICTION, BASED ON THE UNIQUE CIRCUMSTANCES OF THIS CASE, IS CONSISTENT WITH THE GUIDANCE OF THIS COURT AND WITH CONTROLLING PRECEDENT

A. The Court of Appeals Correctly Held That It Had Primary Jurisdiction Over The District Court's Order Under the Plain Language of § 16(a) of the FAA

The Court of Appeals correctly held that it had jurisdiction under § 16(a) of the FAA over the District Court's order "denying a petition under section 4 of this title to order arbitration to proceed". 9 U.S.C. § 16(a)(1)(B). The unanimous decision, written by Circuit Judge Sloviter, relied upon *Sandvik AB v. Advent International Corporation*, 220 F.3d 99 (3d Cir. 2000), an opinion authored by Chief Judge Becker. *Sandvik* analyzed § 16(a) at length, concluding that the "more natural" reading of § 16(a) "would be to treat *all* orders declining to compel arbitration as reviewable." *Id.* at 103 (emphasis added).

As stated in *Sandvik*, § 16 evinces "clear Congressional intent that challenges to refusals to compel arbitration be promptly reviewed by the appellate courts." *Id.* at 100 ("plain language" contemplates interlocutory appeals from orders denying arbitration because of questions related to their validity). The statute does not limit appeals to orders denying arbitration on specified grounds. To the contrary, § 16(b) lists certain arbitration-related orders that are not immediately appealable and makes no such distinction, further supporting the Court of Appeals' conclusion in this case that it had primary jurisdiction over the District Court's order. As with the statute construed in *Smith v. Vulcan*, 165 U.S. 518, 524-25

(1897), the "grammatical construction and natural meaning" of § 16(a) allows "an appeal to be taken from *the whole* of such interlocutory order or decree" (appeal under an act authorizing interlocutory appeals granting or continuing injunctions in patent cases not limited to only that part of the order which grants or continues an injunction).[1]

Palcko's argument concerning pendent appellate jurisdiction rests upon the incorrect assumption that "there was no primary appellate jurisdiction in this case," asserting that § 16(a) of the FAA authorizing an interlocutory appeal was inapplicable because she "is a transportation worker exempted from the Act." (Petition at 9) That assumption ignores Palcko's acknowledgement elsewhere in the Petition that the Court of Appeals had primary jurisdiction to determine whether she fell within the exemption provision of § 1 of the FAA. (Petition at 4) It also ignores the plain language of § 16(a). As the Court of Appeals observed:

> Palcko's argument would create the curious situation in which either all district courts' orders denying arbitration based on § 1's exemption clause would be beyond appellate review, which contradicts section 16(a)'s plain language, or the determination of our appellate jurisdiction would be contingent on the outcome of our review of the District Court's finding on the exemption question, which is precisely what we are barred from doing in the absence of appellate jurisdiction.

---

[1] Review of the entire order would also be appropriate under 28 U.S.C. § 1292(a)(1), if not also under the collateral order doctrine, because the District Court's order effectively enjoined arbitration and, as such, is an interlocutory injunction. *See, e.g., Gulfstream Aerospace Corporation v. Mayacamas Corporation*, 485 U.S. 271, 287-88 (1988)(§ 1292(a)(1) will "continue to provide appellate jurisdiction over orders that . . . have the practical effect of granting or denying injunctions and have 'serious, and perhaps irreparable consequences.'").

Other Courts of Appeal similarly construe the plain language of § 16(a). *See Snowden v. Checkpoint Check Cashing,* 290 F.3d 631, 635-36 (4th Cir.)(ruling that under § 16(a), unequivocal record reflecting denial of motion to compel arbitration "is all that is necessary" to grant appellate jurisdiction), *cert. denied,* 537 U.S. 1087 (2002); *Boomer v. AT&T Corporation,* 309 F.3d 404, 412 (7th Cir. 2002)(concluding that the plain language of § 16(a) provides for an immediate appeal from ". . . 'an order denying a petition to order arbitration to proceed'", stating that the Third Circuit's decision in *Sandvik AB v. Advent International Corporation, supra,* 220 F.3d 99 (3d Cir. 2000), "provides a thorough analysis of the issue and one that bears repeating"); *Koveleskie v. SBC Capital Markets, Inc.,* 167 F.3d 361, 363 (7th Cir.) (holding that order denying motion to compel arbitration is immediately appealable under § 16(a), even though order states that discovery needed before arbitrability can be decided), *cert. denied,* 528 U.S. 811 (1999); *McLaughlin Gormley King Company v. Terminix International Company, L.P., 105* F.3d 1192, 1193 (8th Cir. 1997)(ruling that "an order that favors litigation over arbitration . . . is immediately appealable under § 16(a)"). *See also, Microchip Technology Incorporated v. U.S. Phillips Corporation,* 367 F.3d 1350 (Fed. Cir. 2004) (finding that § 16(a) allows for immediate appeal of the denial of a motion to compel arbitration even where district court intended to reconsider the question of arbitrability) and *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159 (5th Cir. 2004)(holding that § 16(a)(1) confers jurisdiction over appeal of order denying arbitration notwithstanding district court's opinion that the documents at issue failed to constitute a binding agreement to arbitrate).

Contrary to Palcko's assertion, *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company,* 84 F.3d 988 (7th Cir. 1996) does not support the notion that the Court of Appeals lacked primary jurisdiction

in this case. In the more recent *Boomer* decision, the Court of Appeals for the Seventh Circuit adopted the *Sandvik* analysis, which rejects a refusal to follow the plain text of § 16 and also rejects the premise expressed in *Central States* that there is no harm in forcing a party to endure protracted litigation only to be vindicated, after trial, by an appellate ruling that the case should have been sent to arbitration. As stated in *Sandvik*, "the FAA's text and the precedent interpreting it militate against" forcing a party to endure "a full trial on the underlying controversy before it can receive a definitive ruling on whether it was legally obligated to participate in such a trial in the first instance." 220 F.2d at 104.

The interlocutory order from which the appeal was taken in *Central States* also differs significantly from the order in this case. It did not reach any issue under the FAA, let alone the exemption issue, so the Court's determination that it lacked appellate jurisdiction was not contingent upon its review of the district court's findings, as would have been required below. Rather, the interlocutory order in *Central States* refused to compel "alternative dispute resolution" under a collective bargaining agreement on the ground that the defendant waived any right to arbitration by waiting for nearly a year before invoking the provision, conducting discovery and filing status reports. *Id.* at 990.

Microchip, also cited by Palcko as evidence of a conflict among the Circuit Courts over primary jurisdiction, is equally inapposite because it did not involve a § 1 exemption issue under the FAA and because the Court, consistent with the decision below, found primary appellate jurisdiction to review the denial of an order compelling arbitration. *Id.* at 1355 (stating that § 16(a) reflects a Congressional determination that denials of orders to arbitrate have "serious, perhaps irreparable,

consequences").[2] Palcko's reliance on *Rodriguez v. Handy,* 802 F.2d 817 (5th Cir. 1986) to suggest that the Court below erred in exercising pendent appellate jurisdiction is equally misplaced where, as here, the Court of Appeals correctly concluded that it had primary appellate jurisdiction under § 16(a) over at least one of the two District Court's rulings subsumed within its single order denying arbitration.

B. It Was Proper for the Court of Appeals to Exercise Its Jurisdiction Over the District Court's Order in Its Entirety

1. The Court of Appeals Properly Stated the Permissible Applicable Law of Pendent Appellate Jurisdiction

Palcko does not dispute that if primary appellate jurisdiction existed, the Court of Appeals' discretionary exercise of pendent appellate jurisdiction was proper. Palcko does not and cannot take issue with the Court of Appeals' articulation of pendent appellate jurisdiction, which is derived from this Court's formulation in *Swint v. Chambers County Commission,* 514 U.S. 35 (1995).

In *Swint,* this Court rejected the exercise of pendent party appellate jurisdiction based solely on reasons of judicial economy and, in the process, intimated when the exercise of pendent appellate jurisdiction might be proper. *Id.* at 50-51. The Court subsequently confirmed *Swint's* approach in *Clinton v. Jones,* 520 U.S. 681, 707, n. 41 (1997), holding that the appellate court properly exercised pendent appellate jurisdiction because the District Court's legal

---

[2] It did so by reading § 16(a) as "removing the barriers to appellate jurisdiction under 28 U.S.C. § 1292(a)"(interlocutory appeals from injunctions). *Id.* 1354-55. The Federal Circuit, then, would reach the same result on primary jurisdiction as did the Third Circuit in this case, although on the basis of both § 16(a) and § 1292(a) rather than just § 16(a).

ruling on the appealable ruling was "inextricably intertwined" with its otherwise nonappealable ruling; and further holding that review of the latter decision was also necessary to ensure meaningful review of the former. This Court again held the exercise of pendent appellate jurisdiction to be proper in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 770. n.2 (2000), in which the Court of Appeals exercised pendent appellate jurisdiction over a nonappealable statutory question in conjunction with an appealable ruling on Eleventh Amendment immunity from suit under the statute.

The Court of Appeals for the Third Circuit closely adheres to this Court's dictates concerning pendent appellate jurisdiction, carefully following the reasoning in *Swint*, and the guidance in *Clinton* and *Vermont*. In *E.I. Dupont De Nemours and Company v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 202-03 (3d Cir. 2001), relied upon in the decision below, the Court of Appeals explained that "post-*Swint*, we have defined pendent appellate jurisdiction to mirror the Supreme Court's two examples: inextricably intertwined orders or review of the non-appealable order where it is necessary to ensure meaningful review of the appealable order". Pendent appellate jurisdiction, which is "discretionary and narrow in scope," "should be used 'sparingly,' and only where there is sufficient overlap in the facts relevant to both . . . issues to warrant plenary review." *Id.* at 203, *citing In re Montgomery County*, 215 F.3d 367, 375-76 (3d Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001).

This approach to the exercise of pendent appellate jurisdiction is consistent with the post-*Swint* approach taken by other Courts of Appeals. As recently observed by the Court of Appeals for the District of Columbia Circuit, other circuits "will *only* take pendent appellate jurisdiction when one or both of the *Swint* conditions appear". *Kilburn v.*

Socialist's People's Libyan Arab Jamahiriya and Libyan External Security Organization, 376 F. 3d 1123, 1134 (D.C. Cir. 2004)(collecting post-*Swint* cases in the appellate courts)(noting D.C. Circuit's view that *Swint* not meant to describe a definitive or exhaustive list of conditions for exercising pendent appellate jurisdiction but that it should be exercised "sparingly" and "only when substantial considerations of fairness or efficiency demand it").

2. The Court of Appeals Properly Exercised Pendent Appellate Jurisdiction Because of the Overlapping Facts Warranting Plenary Review, the Closely Intertwined Issues and the Need to Meaningfully Review the Appealable Order

In keeping with its post-*Swint* approach, the Court of Appeals correctly concluded that it should exercise pendent appellate jurisdiction over the federal preemption issue in this case, even if, as Palcko urges, only the exemption issue arising under § 1 is appealable under § 16(a) of the FAA. Both issues involve federal questions arising from the same statutory language, both consider arbitrability, both involve the same operative facts separate from the merits of the dispute, and both arise in an order over which § 16(a) authorizes an interlocutory appeal.

The FAA exemption issue and the FAA preemption issue "arise from a single arbitration agreement that provides alternative grounds for the arbitration of all claims arising from Palcko's employment with Airborne." Palcko's [illegible] VII and state law claims both "arise from the same set of facts related to her conditions as an Airborne employee." (Pet'r App. 11a) This overlap of identical facts "warrants plenary review" and, the Court further found, the issues are "so closely intertwined" "that our taking of pendent

appellate jurisdiction over the former is necessary to ensure meaningful review of the District Court's order *in its entirety*." (Pet'r App. 11a)(emphasis added).

The preemption issue did not implicate any parties, facts or statutory provisions beyond those addressed under the exemption issue. The Court of Appeals' exercise of pendent appellate jurisdiction over these closely intertwined issues was as narrow as that exercised in *Clinton* and considerably more narrow than that exercised in *Vermont*. In *Vermont*, the Second Circuit's review of the nonappealable statutory question involved construction of the statutory definition of "person" under the False Claims Act, as opposed to the inquiry under multiple other provisions of the Act relating to the federal government's rights, authority and control to determine whether the plaintiff or the United States was the real party in interest for purposes of determining whether immunity under the Eleventh Amendment existed. *See Vermont Agency of Natural Resources v. United States*, 162 F.3d 195 (2d Cir. 1998), *rev'd*, 529 U.S. 765 (2000).

The nature of the District Court's order in this case and the consequences of a deferred review further compelled the exercise of pendent appellate jurisdiction to ensure meaningful review. As recently explained in *CTF Hotel Holdings, Inc. v. Marriott International, Inc.*, 381 F.3d 131 (3d Cir. 2004), resolution of the nonappealable preemption issue in this case necessitated "a particular ruling on the appealable order". *Id.* at 142 (Smith, C.J. concurring in part and dissenting in part). Reversal of either the exemption ruling or the preemption ruling would necessarily lead to action on the single order, which is clearly appealable under § 16(a). Further, had jurisdiction not been exercised in this case, reversal of the preemption issue from a final order "would be meaningless" because Airborne "would have already been subjected to the protracted litigation that it

sought to avoid through the arbitration agreement." *Id.* at 141-42. *Accord, Powers v. The Southland Corporation,* 4 F.3d 223, 230-31 (citations omitted), *reh'g en banc denied,* 4 F.3d 223 (3d Cir. 1993) (explaining that "legal and practical value" of asserted right not to litigate "would be destroyed if not vindicated before trial"). *See also Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 342 (8th Cir. 1990)(stating that "denial of a motion to compel arbitration can only be effectively challenged on immediate appeal because the advantages of arbitration will be forever lost if the appeal is delayed") and *Kansas Gas & Electric Company v. Westinghouse,* 861 F.2d 420, 422 (4th Cir. 1988)(stating that orders denying arbitration have injunctive effect and serious consequences because they force parties to undergo expense of trial before able to appeal).

The logical inverse of Palcko's challenge to the Court of Appeals' exercise of pendent appellate jurisdiction because it found her within the § 1 exemption is that pendent appellate jurisdiction may be exercised over the federal preemption issue only when a worker is within the FAA's coverage – precisely when no issue of preemption arises and review would be meaningless. Accepting this argument means that meaningful review of the preemptive effect of the § 1 exemption would always be foreclosed even when, as here, the District Court so clearly erred on the preemption issue.

Neither the District Court nor Palcko cited any authority to support the proposition that § 1 preempts state law favoring arbitration. In contrast, the Court of Appeals correctly applied Supreme Court precedent in analyzing the District Court's preemption ruling, including *Bernhardt v. Polygraphic Company,* 350 U.S. 198, 202 (1956)(directing federal court to apply state law governing arbitration agreement where agreement is not subject to FAA) and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford*

Junior University, 489 U.S. 468, 477 (1989)(citing *Bernhardt* as "upholding application of state arbitration law to arbitration provision in contract not covered by the FAA" and upholding the parties' choice of state rules regarding arbitration).

The Court of Appeals' decision is also consistent with the uniform suggestions of courts that have looked at the issue under § 1 without squarely having to decide it. *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465, 1472 (D.C. Cir. 1997)(expressing "little doubt" that even if an arbitration agreement is outside the FAA, the agreement may still be enforced under contract law); *Harden v. Roadway Packages Systems, Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001)(intimating that arbitration could be compelled under state law to a trucker excluded under § 1 of the FAA but that trucker waived state law by relying solely upon the FAA to compel arbitration); *see also Great Western Mortgage Company v. Peacock*, 110 F.3d 222 (3d Cir.)(stating that "in the absence of a state law which discourages the enforcement of arbitration agreements, no question of pre-emption, as such, is presented"), *cert. denied*, 522 U.S. 915 (1997).

C. The Court of Appeals' Exercise of Jurisdiction In This Case Is Consistent With and Harmonizes the Multiple Federal and State Policies and Interests at Stake

The exercise of jurisdiction over the preemption issue in this case is consistent with and, indeed, harmonizes the multiple federal and state policies and interests at stake. It furthers the federal policy reflected in the FAA of favoring the enforcement of arbitration agreements according to their terms. It is also consistent with the fundamental policy underpinnings of federalism by facilitating State interests and the traditional deference to state law in an area such as contract law. *See e.g., Medtronic, Inc. v. Lora Lohr et Vir Lora Lohr*, 518 U.S. 470, 485 (1996) (presumption "that the historic

powers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest intent of Congress") and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)(whether a party agreed to arbitrate a particular dispute remains a question of state law governing contract formation, notwithstanding the enactment of the FAA).

The exercise of jurisdiction over the preemption issue is also consistent with federal and state policies favoring the arbitration of the Title VII and Pennsylvania claims at issue in this case. *See* 42 U.S.C. § 12212 (2003)(amending Title VII to encourage the arbitration of disputes) and *Smith v. Cumberland Group, Ltd.*, 455 Pa. Super. 276, 687 A.2d 1167, 1171 (Pa. Super. 1997)(holding that if a valid arbitration agreement exists and the claim is within the scope of the agreement, the controversy must be arbitrated). Washington law also favors arbitration, including specifically in the employment context. WASH. REV. CODE, §§ 7.04.010 (2004).

The exercise of pendent appellate jurisdiction in this case also respects a Congressional direction concerning the timing of appellate proceedings involving orders denying motions to compel arbitration.[3] Just as Congress has given "statutory instructions . . . to control the timing of appellate proceedings" through 28 U.S.C. § 1291 and § 1292, *Swint, supra*, at 48, it has provided clear instructions on the timing of appeals of orders denying motions to compel arbitration through § 16(a).

---

[3] The concern expressed in *Swint* over the potential of undermining the two-tiered arrangement of § 1292(b) if courts of appeals had discretion to append further rulings to a *Cohen*-authorized appeal is not present in this case, where Congress, not the courts of appeals, has expressly authorized an interlocutory appeal. The Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, authorizing this Court to prescribe rules defining when a district court ruling is final for purposes of § 1291 and to provide for appeals of interlocutory decisions is not affected for the same reason.

The Court of Appeals' exercise of jurisdiction over the preemption issue arising under § 1 of the FAA under the circumstances of this case harmonizes all of the applicable federal and state policies while avoiding the conflict created by using the § 1 exclusion to undermine the FAA's primary purpose - to overcome judicial hostility towards enforcing arbitration agreements according to their terms - and § 16(a)'s specific purpose to permit meaningful review of interlocutory orders denying arbitration. It properly did so while also furthering important policies of judicial economy, efficiency and fairness to the parties by resolving an issue fundamental to the conduct of the case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Sharon M. Erwin
Counsel of Record
Hugh B. Gordon
Law Offices of Sharon M. Erwin, L.L.C.
3130 West Penn Street
Philadelphia, PA 19129
(215) 438-8813

Attorneys for Respondent
Airborne Express, Inc.